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Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-21-0245

Billy Jo Bailey

v.

State of Alabama

**Appeal from Etowah Circuit Court
(CC-16-83.71)**

KELLUM, Judge.

The appellant, Billy Jo Bailey, appeals from the Etowah Circuit Court's revocation of his probation. The record indicates that in August

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2016 Bailey was convicted of possessing a firearm when he was one of those persons forbidden to possess a firearm, see § 13A-11-72, Ala. Code 1975. Bailey was sentenced to 15 years' imprisonment; that sentence was split, and he was ordered to serve 3 years' imprisonment followed by 3 years' supervised probation.

On February 26, 2021, Bailey's probation officer filed a delinquency report alleging that Bailey had violated the terms and conditions of his probation by absconding. On November 16, 2021, the circuit court conducted a brief hearing at which Bailey was present and represented by counsel. At the hearing, the following occurred:

"THE COURT: We're here on the case of State of Alabama v. Billy Joe [sic] Bailey, CC-16-83.71. It's on a petition for revocation filed February 26, 2021. Have you had an opportunity to review the petition with your lawyer?

"THE DEFENDANT: Yes, sir.

"THE COURT: Thank you. And after going over that with your lawyer, do you understand the matters before the Court?

"THE DEFENDANT: Yes, sir.

"THE COURT: Any questions?

"THE DEFENDANT: No, sir.

"THE COURT: [Defense counsel], are you satisfied the defendant understands the petition?

"[Defense counsel]: I do, Your Honor.

"THE COURT: All right. As to charge number one, violation of condition number one, absconding, what says the defendant?

"[Defense counsel]: Your Honor, he admits he has not reported, but he denies the actual absconding of a willful non-reporting.

"THE COURT: Okay. What have you got?

"[Defense counsel]: I'll offer testimony from Mr. Bailey, Your Honor, if I may.

"THE COURT: I'll be glad to accept you –

"[Defense counsel]: My summation?

"THE COURT: – summation –

"[Defense counsel]: All right.

"THE COURT: – as his testimony.

"[Defense counsel]: I will. I'll offer that.

"THE COURT: And Mr. Bailey can add to it.

"[Defense counsel]: All right.

"THE COURT: Yes.

"[Defense counsel]: Mr. Bailey is, as you see, Judge, a 64-year-old male. He has a fifteen split three. He served a split portion of his sentence on a pistol possession case. He, according to the report – and he agrees with me – that he did report after he was released but had a bad understanding of what he's supposed to do next.

"He did the split. He did the [substance-abuse program] within prison – or in jail. He reported, as he was told to, when he was released from jail, but there was a lack of understanding about what he was supposed to do afterwards. He thought that that was sort of like a check-off to let them know that he was released and to go on.

"He went to a location that he gave an address to. That address later was condemned, so he had to move from that location. He was found three months ago at a – in his camper in Mountainboro, where he's been residing for a long time. He's had no new charges. He's had no other offenses and no other violations, but he did not report. As far as it being absconding, I know there's a willful intent aspect to it, so that's the only reason why we bring up the issue that we don't feel like it's a willful violation.

"THE COURT: What was the – I know there's a pistol charge, obviously. He got a fifteen split three. There must be some history as well.

"[Defense counsel]: Yes, sir.

"THE COURT: What are the priors for the defendant?

"[Defense counsel]: He had a robbery charge from years past.

"THE COURT: Okay.

"[Defense counsel]: And, I think, a burglary, so that's the nature of the fifteen.

"THE COURT: Okay. Got you. All right.

"[Defense counsel]: They were violent offenses, but, you know.

"THE COURT: All right. Good deal. Anything else you would like to add to what [defense counsel] said?

"THE DEFENDANT: No, sir.

"THE COURT: That would be your testimony today; is that correct?

"THE DEFENDANT: Yes, sir.

"THE COURT: And he stated it exactly the way you wanted me to hear it?

"THE DEFENDANT: Yes, sir.

"THE COURT: Good deal. Recommendation state probation?

"[Probation officer]: Sir, considering the amount of time on supervision – he reported on when he was released on the 17th, and he was told after contacting Officer Pratt that he needed to come back, so I'm sticking with the revocation, sir.

"THE COURT: State of Alabama?

"[Prosecutor]: You Honor, back in June of 2017 – when his split was initially diverted to community corrections in August of 2016, he never reported to community corrections. When he was here for the revocation, he said he didn't know he had to report and thought he was on some kind of unsupervised probation then, so he was ordered to serve the split sentence followed by probation. So, we've heard this excuse before, and this is not his first rodeo. He knew what he was supposed to do. We recommend revocation.

"....

"THE COURT: All right. Based upon the petition and the matters presented before this Court, and the recommendation as well, the Court, considering the totality of all the facts and circumstances in this case, the Court finds that the defendant did abscond and hereby revokes him to his underlying sentence. Good luck, sir."

(R. 3-9.)

On November 16, 2021, the circuit court entered an order revoking Bailey's probation. In its order revoking probation, the circuit court found that Bailey had violated the terms and conditions of his probation by

absconding. The court ordered Bailey to serve the balance of his 15-year sentence in the custody of the Alabama Department of Corrections. This appeal followed.

On appeal, Bailey contends (1) that the circuit court erroneously revoked his probation without first conducting a revocation hearing at which testimony or evidence was presented, and (2) that the circuit court's order revoking his probation is deficient because, he says, it did not adequately set forth the specific evidence relied on for revoking probation as required by Rule 27.6(f), Ala. R. Crim. P.

At the outset, we note that Bailey raised neither of the issues he raises on appeal before the circuit court. Instead, Bailey raises both issues for the first time on appeal. Nevertheless, the issues fall under well settled exceptions to the preservation requirement allowing defendants to challenge the adequacy of a probation-revocation order and whether a revocation hearing was held for the first time on appeal. See Singleton v. State, 114 So. 3d 868, 870 (Ala. Crim. App. 2012) ("This Court has recognized ... exceptions to the preservation requirement in

probation-revocation proceedings: (1) that there be an adequate written or oral order of revocation, McCoo v. State, 921 So. 2d 450 (Ala. 2005); [and] (2) that a revocation hearing actually be held."). Therefore, both issues are properly before this Court for review.

Regarding Bailey's contention that the circuit court failed to conduct a probation-revocation hearing, Bailey specifically argues that the hearing conducted on November 16, 2021, at which no testimony or evidence was presented, was not sufficient to constitute a probation-revocation hearing as required by § 15-22-54, Ala. Code 1975.

In Hollins v. State, 737 So. 2d 1056, 1057 (Ala. Crim. App. 1998), this Court held:

"Section 15-22-54, Ala. Code 1975, requires a hearing as a prerequisite to the revocation of probation. This statutory requirement is mandatory and jurisdictional. Story v. State, 572 So. 2d 510 (Ala. Cr. App. 1990). Additionally, the appellant was denied his constitutional right to due process by the revocation of his probation without a hearing. The minimal due process to be accorded a probationer before his probation can be revoked includes written notice of the claimed violations of probation, disclosure to the probationer of the evidence against him, an opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and to cross-examine adverse witnesses,

a neutral and detached hearing body such as a traditional parole board, and a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation. Rule 27.5 and 27.6, Ala. R. Crim. P. See Armstrong v. State, 294 Ala. 100, 312 So. 2d 620 (1975); Hernandez v. State, 673 So. 2d 477 (Ala. Cr. App. 1995)."

Rule 27.5(b), Ala. R. Crim. P., provides that a probationer "may waive his right to a revocation hearing if he is given 'sufficient prior notice of the charges and sufficient notice of the evidence to be relied upon' and if he 'admits, under the requirements of Rule 27.6(c), [Ala. R. Crim. P.,] that he committed the alleged violation.'" Ex parte Anderson, 999 So. 2d 575, 577 (Ala. 2008).

This Court has repeatedly held that a probation-revocation hearing at which no witnesses testified and no evidence was presented is insufficient to comply with the requirements of § 15-22-54. In D.L.B., 941 So. 2d 324 (Ala. Crim. App. 2006), the defendant, D.L.B., while on probation, was arrested on new criminal charges. On the date of the scheduled probation-revocation hearing, the circuit court conducted a brief hearing at which it heard arguments from both defense counsel and the prosecutor. No testimony was taken at the hearing. At the conclusion

of the hearing, the circuit court revoked D.L.B.'s probation based on the representations made by the State during the hearing. D.L.B. appealed, arguing that the circuit court erroneously revoked his probation without first conducting a probation-revocation hearing and that the hearing conducted by the court was insufficient to comply with § 15-22-54. This Court agreed and reversed the judgment of the circuit court, holding:

"Although the July 13, 2005, hearing purported to be a probation-revocation hearing, the court announced that it was revoking D.L.B.'s probation without hearing testimony from any State's witnesses and without allowing D.L.B. an opportunity to be heard. Because the circuit court revoked D.L.B.'s probation based on the representations of the prosecutor, rather than on evidence presented to the court in the form of witness testimony or other legal evidence, D.L.B. was denied the right to a hearing where he could be heard and present witnesses and documentary evidence and where he could confront and cross-examine adverse witnesses."

D.L.B., 941 So. 2d at 326.

Likewise, in Moore v. State, 54 So. 3d 442 (Ala. Crim. App. 2010), the defendant, Moore, was arrested on new criminal charges, and the State moved to revoke his probation. The circuit court conducted a brief hearing at which Moore, defense counsel, and the State were present. At

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the conclusion of the hearing, the circuit court revoked Moore's probation. On appeal, Moore challenged the sufficiency of the probation-revocation hearing, arguing that no testimony or evidence was presented at the hearing. Relying on our holding in D.L.B., *supra*, this Court reversed the judgment of the circuit court, holding:

"[T]he circuit court revoked Moore's probation without hearing testimony from any State's witnesses and without allowing Moore an opportunity to be heard. The record establishes that the circuit court relied on the representations of the prosecutor, as well as the court's own recollection of evidence presented at an earlier hearing involving Moore's codefendant, in deciding to revoke Moore's probation. The circuit court did not consider evidence in the form of witness testimony or other legal evidence before revoking Moore's probation. Therefore, we must conclude that Moore was denied his right to a probation-revocation hearing."

Moore, 54 So. 3d at 444.

In Saffold v. State, 77 So. 3d 178 (Ala. Crim. App. 2011), the State sought to revoke Saffold's probation based on new criminal charges and the failure to pay court-ordered moneys. The circuit court conducted a brief hearing at which Saffold, defense counsel, and the State were present. At the hearing, Saffold asserted his "innocence on [the] criminal

charges" and informed the court that he was paying a portion of his court-ordered moneys. Saffold, 77 So. 3d at 180. An exchange between Saffold, defense counsel, and the circuit court ensued after which the circuit court revoked Saffold's probation. Saffold appealed and argued, among other things, that the circuit court erroneously revoked his probation without first conducting a revocation hearing. We agreed and reversed the circuit court's judgment, holding:

"The prosecutor represented that Saffold had been arrested on new charges but called no witnesses to testify and presented no other evidence regarding the new charges against Saffold. Saffold was not afforded an opportunity to confront and to cross-examine adverse witnesses after he denied committing the new offenses because the State presented none. Although, unlike the defendant in D.L.B., Saffold was in fact afforded an opportunity to be heard, we question whether Saffold was fully afforded an opportunity to adduce proof by way of witness testimony and documentary evidence that he did not commit the new charges and had not violated the terms and conditions of his probation. ... Therefore, we must conclude that Saffold was denied his right to a probation-revocation hearing."

Saffold, 77 So. 3d at 182.

In this case, the State sought to revoke Bailey's probation based on an allegation that he absconded from supervision while on probation.

At the November 16, 2021, hearing, Bailey denied that he absconded from supervision as alleged in the delinquency report. By way of a summation offered by defense counsel, Bailey explained why he did not believe he had absconded. The State presented no evidence at the hearing regarding the allegation of absconding in the February 26, 2021, delinquency report. Instead, the record indicates that the State and Bailey's probation officer gave limited input during the hearing regarding their respective recommendations for the revocation of Bailey's probation. Furthermore, the record does not indicate that Bailey waived his right to a probation-revocation hearing pursuant to Rule 27.5(b), Ala. R. Crim. P., when he admitted that he failed to report. See Williford v. State, 329 So. 3d 86 (Ala. Crim. App. 2020) (holding defendant did not waive right to revocation hearing based on allegations of absconding where defendant admitted she had not reported to her probation officer but claimed that she had not reported because she had not been informed of any reporting requirements). Accordingly, we reverse the circuit court's revocation of Bailey's probation and remand

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this case for the circuit court to conduct a probation-revocation hearing in accordance with § 15-22-54, Ala. Code 1975, and Rule 27.6, Ala. R. Crim. P.

Because we are reversing the circuit court's revocation of Bailey's probation on the basis that the court failed to conduct a probation-revocation hearing in compliance with Rule 27.6, we need not address Bailey's second contention pertaining to the adequacy of the circuit court's order revoking Bailey's probation. However, we remind the circuit court that Rule 27.6(f), Ala. R. Crim. P., provides that, when revoking probation, "the [j]udge shall make a written statement or state for the record the evidence relied upon and the reasons for revoking probation."

REVERSED AND REMANDED.

Windom, P.J., and McCool and Minor, JJ., concur. Cole, J., concurs in the result.